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IN THE

# Supreme Court of the United States

OCTOBER TERM 1967

No. 543

THE DETROIT EDISON COMPANY,
RALPH WERTZ and HERBERT KNACK,
Petitioners,

v.

EAST CHINA TOWNSHIP SCHOOL DISTRICT No. 3,
DONALD MacDONALD, LELAND SASS, MARY PHILLIPS, MILTON J. GEARING, EDWIN H. LINDOW,
MALCOLM G. SIMONS and WILLIAM HOPSON,
individually and as members of the Board of
Education of said school district,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF OF DEFENDANTS-RESPONDENTS

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, East China Township School District No. 3, Donald MacDonald, Leland Sass, Mary Phillips, Mil-

ton J. Gearing, Edwin H. Lindow, Malcolm G. Simons and William Hopson, individually and as members of the Board of Education of said school district, respectfully file the following brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

## INTRODUCTION

The Appellees have no objection to the following subdivisions of the Petitioners' brief:

(a) Opinions in the courts below

(b) Jurisdiction of this court

(d) Constitutional provisions and statutes involved

(f-g) Alleged basis for federal jurisdiction

This brief contains a counter-statement of (c) questions presented for review, and (e) concise statement of the case.

## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does a three-step state statute for school district annexation requiring: (1) initiation by resolution of the board of education of the annexing school district (2) approval of the proposed annexation by the State Superintendent of Public Instruction, and (3) a majority vote in favor of the annexation by the qualified school electors of the district or districts to be annexed, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

2. Does a state school statute authorizing a debt assumption election subsequent to such an annexation proceeding

violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the votes of all electors in the newly formed district have the same weight and are counted together on the question?

3. May a federal district court decline to take jurisdiction of a case under 28 U.S.C. §1343(3), upon a finding that the primary objective of the plaintiffs is to be relieved of taxes, a property rights claim, and not a claim of deprivation of personal rights?

4. Upon finding that a case involves essentially the claimed illegality of a state school property tax, and upon the further finding that the plaintiff has an adequate and effective remedy in the state courts, is a federal district court barred by 28 U.S.C. §1341 and the abstention doctrine from assuming jurisdiction?

## COUNTER-STATEMENT OF THE CASE

This case involves a three-step school district annexation proceeding under the section of the Michigan School Code set forth in the Petition for Writ of Certiorari (pp. 53-56) [hereinafter cited as Petition]. Each of the steps was precisely followed. The annexing school district's board of education initiated the proceeding by a proper board resolution. This was followed by approval of the proposed annexation by the State Superintendent of Public Instruction. Finally, a majority vote of the electors in the districts to be annexed approved the annexation.

The facts material to a legal determination of the case at bar are properly stated by the District Judge (Petition pp. 22-23) and the Sixth Circuit Court of Appeals (Petition pp. 42-43). Respondents respectfully adopt these statements of the two lower courts as their Counter-Statement of the Case.

## ARGUMENT

### I.

### The case is controlled by *Hunter* v. *Pittsburgh*

Petitioners are frank to admit at the outset that the authority of *Attorney General ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905), has not been diminished by passing time, and that the Michigan legislature might have brought about this annexation and debt assumption "at its whim and caprice", to quote the words of the Petitioners (Petition p. 8). Yet, as we read the Petition, the chief claim now made by our opponents is that the leading case for this proposition, *Hunter v. Pittsbugh*, 207 U.S. 161 (1907), has somehow been undercut by the recent so-called "apportionment cases."

*Hunter* involved an annexation much like that carried out by the respondents in this action. Following the procedure outlined in a Pennsylvania statute, the electors of the City of Pittsburgh and the City of Allegheny voted together as to whether or not Allegheny should become a part of Pittsburgh. The majority of all votes cast in the two cities favored annexation, although a majority of the Allegheny voters were opposed. Thus the constitutional claims were virtually identical to those presented in this case. The Supreme Court decided the case with an opinion that spoke strongly of the power that states possess to change their various municipal subdivisions:

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers con-

> ferred upon these corporations and the territory over which they shall be exercised rest in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. *In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.*" 207 U.S. at 178-179. (Emphasis supplied).

The lesson of *Hunter* is, then, that the power of a state to alter boundaries of its political subdivisions is so great that the residents of the subdivisions cannot assert in opposition any right secured by the Federal Constitution. More specifically, residents of a school district have no vested rights in the continuation of that district with its boundaries unchanged. The states are thus permitted to respond as necessary to such local needs as shifts in population, changes in wealth, new methods of education, and other factors too numerous to mention. Any other result would "freeze" or stagnate local boundaries thereby thwarting the state in its paramount duty, that of providing the best government for *all* its citizens.

**The *Hunter* Doctrine Reaffirmed**

In his opinion below (Petition pp. 25-29), Judge Levin reviewed the most recent reapportionment cases, concluding that none of them has diminished the vitality of *Hunter*. He noted this Court's denial of certiorari in the recent case of *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), *cert. denied*, 382 U.S. 837 (1965). In that case residents of a district annexed to the City of Corpus Christi complained of denial of equal protection in an annexation proceeding where they were denied *any* vote, direct or indirect. The Fifth Circuit affirmed the trial court's dismissal in an opinion that relied strongly upon *Hunter*. The various grounds stated for the dismissal, incidentally, show how closely the action of the trial court parallels that of the district court in this case:

> "(1) The annexation of lands to a City has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate; (2) the Court has no power to either enjoin the collection of City taxes on the property annexed or to impound taxes already collected because there is a plain, speedy and efficient remedy in the Courts of Texas; (3) there is no diversity alleged and the amount in controversy is not alleged to be over $10,000.00; (4) there is no Federal question present; and (5) the Annexation Ordinances under attack here have already been upheld by the Texas Courts." 343 F.2d at 163.

Judge Levin then summarized *Hunter* and its application to the case at bar in the following language:

> "The foundation on which the Hunter doctrine has stood for half a century on the issue of annexation procedure is as sturdy as ever. This Court holds, therefore, that the school district annexation

> procedure of the Michigan School Code, which was followed by the original East China District in forming the combined district, is a purely legislative matter. It is not justiciable under the due process or the equal protection clauses of the Fourteenth Amendment to the Federal Constitution." (Petition p. 30).

On this subject, the Sixth Circuit's affirming opinion quoted with approval from *International Harvester Co. v. Kansas City*, 308 F.2d 35 (1962), *cert. denied*, 371 U.S. 948 (1963):

> "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. . . ." (Petition p. 48).

Petitioners attempt to resurrect in this court their claim that this case is somehow related to *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where Negroes were systematically excluded from the boundaries of the City of Tuskegee, Alabama. That case stands for the proposition that even the *Hunter* doctrine must yield when it can be enforced only at the expense of rights protected by the Fifteenth Amendment. It is fair to say, in fact, that *no* state action is permissible when taken because of the color of the citizens concerned. What possible significance can the *Gomillion* rule have, however, in this case? There is not even a hint of discrimination because of race, color, or creed. The District Court (Petition p. 25) and the Sixth Circuit (Petition p. 48) agree that *Gomillion* does not diminish the authority of *Hunter* in annexation procedure cases such as this one.

**The Reapportionment Cases are Inapplicable**

Petitioners next try to bring this tax case within the doctrine of such reapportionment cases as *Reynolds v. Sims*, 377 U.S. 533 (1964). Their argument was disposed of by Judge Levin in this succinct statement:

> "The right at stake in the reapportionment cases is that, in state representative government, the weight of the vote of a citizen in one electoral district be approximately equal to the weight of another citizen's vote in any other electoral district. A state may not create electoral districts which have a population disparity. But this is the only limitation the cases place upon the legislative power of a state to define political boundaries. They create no constitutional rights in affected citizens concerning the *procedure* for creating or altering these districts." (Petition pp. 27-28).

The Sixth Circuit Court of Appeals affirmed the district court's determination on this point.

**Representative Government and Local Government Guidelines**

At this late stage of the case, the Petitioners attempt to give a fresh appearance to their familiar arguments with the claim that the board members of the former East China School District having been elected prior to any movement toward annexation and debt assumption, "were not true spokesmen for their constituents on these issues." (Petition p. 9). No allegation of constitutional infringement is made on this point, nor are cases cited in support thereof. Such a position is clearly contrary to the principles of rep-

resentative government. To carry Petitioner's argument to its logical conclusion, every representative body of government, from the United States House of Representatives to the smallest local council, would have to recess for elections each time a new issue was encountered. Such a claim hardly deserves a serious response.

The three-step annexation procedure of the Michigan School Code (Petition p. 53) comes within the guidelines for flexible local government reorganization set forth by this Court in the recent decision of *Sailors v. Kent Bd. of Educ.*, — U.S. —, 18 L.ed.2d 650 (1967). This Court may well have had the doctrine of *Hunter v. Pittsburgh* in mind when it stated:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects non-legislative officers, a state can appoint local officials or elect them, or combine the elective and appointive systems as was done here." 18 L. ed. 2d at 655.

We note in passing that the Board of Education for Kent County in the *Sailors* case could transfer areas from one school district to another, a power that can scarcely be distinguished from that of the former East China School Board to initiate the annexation proceeding involved in this case.

## II.

### The Burdens Imposed by the Debt Assumption Proceeding are Not Justiciable

The district court held that the burdens imposed by the debt assumption proceeding were non-justiciable and not in violation of any Federal constitutional guarantee. (Petition pp. 31-32). Even if the jurisdictional requirements had been met, however, the Court decided that there were grounds for dismissing the action under the "abstention doctrine" (Petition pp. 39-40). The Sixth Circuit affirmed by saying:

> "With respect to the constitutional issues concerning the debt assumption proceedings (i.e., that the procedures employed pursuant to state statute were violative of the due process and equal protection clauses of the Fourteenth Amendment, and that the tax imposed as a result thereof was so disproportionate to the benefits received as to amount to confiscation), the District Court's determination based on application of the abstention doctrine will be affirmed, although the court's conclusions on both these issues on the merits is also deemed correct." (Petition p. 49).

The principles set forth in *Hunter* had previously been applied with like effect in two cases that decided a state has power to increase or decrease the area burdened with existing debt. These two cases, *Laramie County v. Albany County*, 92 U.S. 307 (1875), and *Attorney General ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905), stand even today as unassailable authority in support of a state's power to alter municipal boundaries, although the change may result in higher tax bills for the residents concerned. Such matters are simply not justiciable under the Fourteenth Amendment.

At issue in *Laramie* was the division of a Wyoming county under circumstances that subjected certain residents to a greater per capita debt without affording them a vote on the proposition. The Wyoming legislature had created two new counties out of the western portion of Laramie County, thereby reducing the area of that county by more than two-thirds of its original size. The bulk of taxable property was thus transferred to the new county, without any provision for the new county to assume its pro rata portion of the debt of the original county. The Supreme Court affirmed dismissal of a suit to compel the new county to pay a portion of the debt. The constitutional claim was denied in broad terms:

> "Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretention to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." 92 U.S. at 311-12 (Citations omitted).

*Kies v. Lowrey* was a Michigan school district case. A new district had become liable under state law for the debts

of its predecessors. It was the claim of the plaintiffs that the creation of the new district under these circumstances violated, among other things, the due process clause of the Fourteenth Amendment. Affirming the dismissal, the Supreme Court held that the case was controlled by *Laramie*.

### The Corporate Petitioner's Voting Rights Claim Is Self-Defeating

Not only are the reapportionment cases inapposite to the facts now before the Court, the Petitioners are actually in the same position as the losers, not the winners, of those cases! Our opponents are asking this Court to order groupings of electors on the basis of prior political boundaries and to assign a different weight to the votes in a particular group, a practice forbidden by the reapportionment cases. The District Court said on this point:

> "A fortiori, the 'one-man, one-vote' command applies to direct suffrage such as in the debt assumption. The proposed grouping is no more legitimate than the rejected rural-urban groupings [in the reapportionment cases]." (Petition p. 32)

The Petitioners thus seek nothing less than a veto power for their minority group over all annexations and debt equalizations in East China School District.

## III.

### 28 U.S.C. §1343(3) Does Not Make Every Case a Subject for Federal Jurisdiction

There is no jurisdictional windfall in 28 U.S.C. §1343(3) for every complainant who seeks to try his luck in federal court. The requirements of 28 U.S.C. §1331(a) concerning jurisdictional amount would have no meaning if a litigant could simply, by asserting constitutional grounds, obtain federal jurisdiction to try a question of property rights. The same abuse would also vitiate the Johnson Act, 28 U.S.C. §1341, and its prohibition against suits to block state taxes.

Judge Levin explained why the individual plaintiffs are not entitled to civil rights jurisdiction under 28 U.S.C. §1343(3):

> "A major purpose of Civil Rights jurisdiction is to redress the deprivation of constitutional rights which have no pecuniary valuation. To entertain jurisdiction under 28 U.S.C. §1343(3) over essentially property claims only because the plaintiff alleges a constitutional deprivation, could lead to a widespread circumvention of 28 U.S.C. §1331a with its jurisdictional amount limitation. *Hague v. C.I.O.*, 307 U.S. 496, 531-532, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). See also *Pierre et al. v. Jordan*, 333 F.2d 951 (9th Cir. 1964)." (Petition p. 37)

The Sixth Circuit did not discuss the civil rights jurisdictional question. It held with respect to the annexation issue that no claim was stated upon which relief could be granted and that the abstention doctrine applied to the debt assumption issues (Petition pp. 45, 51).

Attempts to invoke civil rights jurisdiction in cases that are truly state tax cases have not been successful. *Reiling*

*v. Lacy*, 93 F. Supp. 462 (D. Md. 1950); *Abernathy v. Carpenter*, 208 F. Supp. 793 (D. Mo. 1962), *aff'd*, 373 U.S. 241 (1963); *Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); and *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

In *Gray v. Morgan* the plaintiffs sought to invoke civil rights jurisdiction through the equal protection and due process guarantees of the Federal Constitution in an action to have a Wisconsin state income tax declared unconstitutional. The Seventh Circuit found there was no civil rights jurisdiction, pointing out that the plaintiffs had failed to cite any case where 28 U.S.C. §1343 provided federal jurisdiction in a suit for relief against a state tax. We note that the present petitioners, too, lack any authority for their claim. The Court went on to review the history and application of the civil rights jurisdictional statute:

> "Under the circumstances present here, we find nothing in the history of construction of the civil rights statute, §1343, to indicate its concern with the validity of a state tax as a revenue measure. Thus far, at least, it is quite clear that the courts have generally treated this statute as applicable to personal liberty rather than a property or monetary claim." 371 F.2d at 175.

The opinion also relied upon *Abernathy v. Carpenter* and *Hague v. CIO* in disposing of the plaintiffs' claim for Section 1343 jurisdiction.

The justification for jurisdictional restraint in Section 1343 cases was set forth in *Deloach v. Rogers*, 268 F.2d 928 (5th Cir. 1959). Jurisdiction had not been conferred upon the federal district courts, the opinion said, for the redress of every violation of rights guaranteed by the United States Constitution. After all, any constitutional question properly raised in a state court will ultimately

come to the United States Supreme Court for decision. In refusing to take jurisdiction under Section 1343 of a claim based on an assault at the hands of a county sheriff, the Fifth Circuit made the following statement:

> "With an apparent concession that the authorities thus far decided do not sustain his claim that there is Federal jurisdiction in this case, the appellant urges that recent decisions have shown an enlarging concept of Federal rights jurisdiction. The cases cited are all based upon racial discrimination. These fall within the 'equal rights' provision of 28 U.S.C.A. 1343(3). There is a complete absence of any suggestion in the pleadings of the appellant of any discrimination by reason of class or race." 268 F.2d at 930.

It need hardly be added that no claim of racial discrimination has been made in this case.

## IV.

### The Provisions of 28 U.S.C. §1341 Bar Federal Court Jurisdiction in This Case

The district court recognized that the Johnson Act, 28 U.S.C. §1341, prohibits the federal courts from granting injunctive relief in suits involving the assessment, levy or collection of taxes under state law and requires a like restraint in the use of the declaratory judgment procedure (Petition pp. 38-39); *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293 (1943). After finding that Michigan provides a "plain, speedy and efficient" remedy in the state courts for persons attacking any tax under state law, the court decided that all elements were present for application of the abstention doctrine:

> "While the plaintiffs urge various constitutional claims, the Court cannot close its eyes to the relief sought. This is a tax case. The Court has been presented with no consideration of policy and no exceptional circumstances which should make the abstention doctrine inapplicable" (Petition p. 39).

This holding was specifically affirmed by the Sixth Circuit.

The abstention doctrine established in *Great Lakes Dredge & Dock Co. v. Huffman,* when applied to state tax cases, is one of true, total and complete abstention. This policy is to be distinguished from the discretionary abstention doctrine identified with the leading case of *Railroad Comm. v. Pullman Co.,* 312 U.S. 496 (1941). The type of abstention defined in *Pullman* is applied at the discretion of individual judges within established limits, but only in non-tax cases. In contrast, the *Great Lakes* abstention doctrine affirmatively requires federal judges to decline jurisdiction in *all* state tax cases.

The duty of federal courts to decline jurisdiction in state tax cases was recently explained again in *Zenith Dredge Co. v. Corning,* 231 F. Supp. 584 (D. Wis. 1964). There the Court declined jurisdiction of plaintiff's declaratory judgment action to have a Wisconsin withholding tax law declared invalid as to foreign corporations. The Court distinguished the two types of abstention in this passage:

> "Plaintiffs have cited *England v. Louisiana State Board of Medical Examiner's,* 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 440 (1964). That case is not in point. *England* was not a §1341 (Johnson Act) case. It was an action for declaratory judgment and injunction that the Louisiana Medical Practice Act as applied to the plaintiffs contravened the Fourteenth Amendment. A three-judge court invoked the doctrine of abstention, the basis for such action being that 'The State Court might effectively

end this controversy by a determination that chiropractors are not governed by the statute.'

"The present case is an example of 'true abstention', as that concept is defined by Justice Douglas in his concurring opinion in *England*. An example of true abstention is where '[a] Federal Court declines to entertain an action for declaratory relief against state taxes because of the federal policy against interfering with them by injunction.' " 231 F. Supp. at 587.

The following cases follow the same rule of declining federal jurisdiction in declaratory judgment actions involving the alleged unconstitutionality of state tax statutes. *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965); and *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

In their discussion of the abstention doctrine (Petition p. 18), the Petitioners advert to the pendant jurisdiction doctrine represented by *Bell v. Hood*, 327 U.S. 678 (1946), and *Hurn v. Oursler*, 289 U.S. 238 (1933). The Court will certainly recognize, though, that pendant jurisdiction has nothing to do with this case. For when the lower courts considered the abstention question, they had to *assume* that there would be federal court jurisdiction, if only one of the issues had not been a state tax matter.

The Petitioners could not invoke pendant jurisdiction, though, even if the abstention doctrine did not apply to this state tax case. Where federal claims are disposed of at preliminary stages of a federal district court proceeding, as in the case at bar, claims based upon pendant jurisdiction will also be dismissed. *T. B. Harms Co. v. Eliscu*, 339 F. 2d 823 (2nd Cir. 1964), *cert. denied*, 381 U.S. 915 (1965); *McFaddin Express, Inc. v. Adley Corp.*, 346 F. 2d 424 (2nd Cir. 1964); *Carliner v. Fair Lanes, Inc.*, 244 F. Supp.

25 (D. Md. 1965); *Hoover v. Allen*, 241 F. Supp. 213 (D. N.Y. 1965).

The Petitioners assert loftily (Petition p. 17) that a decision in their favor would not mean "any disruption of the state's general finances". They may well be right, but what earthly importance is there in this fact? East China School District levied the taxes we are concerned with, not the State of Michigan, and it is the district that has been forced to borrow large sums from the State to meet the deficit brought about by refusal of the corporate petitioner to pay its considerable share of anticipated tax revenues.

While Detroit Edison may find that it can adopt a detached view of this proceeding, the school district cannot. The district must support its schools in the face of long drawn out litigation that has tied up a large share of needed income. It is precisely this situation, in fact, that first gave rise to the abstention doctrine. The uncertainty of affairs in the school district, too, which is suddenly a matter of concern to the Petitioners (Petition p. 17), will be cured if this action is terminated and they are required to follow the less disruptive practice of paying their assessed taxes to the district, and then suing for a refund in the state courts.

## RELIEF REQUESTED

The Respondents respectfully pray that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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